

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER MICHAEL) No. C 04-02231 JW (PR)
PARRA,)
Petitioner,) ORDER DENYING PETITION FOR
vs.) A WRIT OF HABEAS CORPUS
ANTHONY NEWLAND, Warden,)
Respondent.)

Petitioner, a California prisoner proceeding pro se, seeks a writ of habeas corpus under 28 U.S.C. § 2254. The petition was dismissed with leave to amend, and on May 21, 2007, petitioner filed an amended petition. After reviewing the amended petition, the Court ordered respondent to show cause why a writ of habeas corpus should not be granted based on petitioner's cognizable claim for relief. Respondent has filed an answer, along with a supporting memorandum and exhibits. Petitioner did not file a traverse.

BACKGROUND

In 2002, a jury in Alameda County found petitioner guilty of second degree burglary, and found true allegations that he suffered prior "strike" convictions. Thereafter, the trial court sentenced petitioner to a term of 35 years to life in state prison

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1 under California's "Three Strikes" laws. The California Court of Appeal affirmed the
 2 conviction and sentence, and the California Supreme Court denied review.

3 The California Court of Appeal set forth the following summary of the evidence
 4 adduced at trial:

5 On December 27, 2000, Juvencio Santos was working by himself at
 6 Rosano Jewelers located within the Montgomery Ward store in Fremont.
 7 Before leaving for a break, Santos placed a sign on top of a display case,
 indicating he would return in 30 minutes. The keys to the locked display
 cases were kept at the watch repair bench, inside the counter and out of
 public view. As Santos returned to the jewelry display area after a five to
 8 six minute absence, he heard the sound of sliding doors and saw a head
 duck down inside the counter.

9 Appellant was crouched inside the enclosed counter area, with his
 10 hands inside an open display case, holding a tray of gold rings. When
 11 Santos asked what he was doing, appellant stood up, saying: "[P]lease let
 12 me go." Santos noticed some jewelry was missing from other display cases,
 and told appellant to put everything back. Appellant removed some jewelry
 13 from his pockets and placed it on top of the case. When Santos told him
 more jewelry was missing, appellant reacted nervously and tried to leap
 over the counter. Santos pushed him back. After getting a running start,
 14 appellant succeeded in jumping over the counter, and both men fell to the
 floor.

15 Appellant struggled to escape as Santos tried to hold him. Santos did
 16 not think appellant hit him, but recalled appellant swinging his arms trying
 17 to get away.¹ A store cashier who observed the struggle testified: "I had
 seen, if I could recall, Mr. Parra did land a clean punch on Mr. Santos."
 18 After appellant broke free, Santos discovered his lip was bleeding. Santos
 also jewelry scattered on the floor on both sides of the jewelry counter and
 in the area of the struggle. Three display cases had been opened.

19 A security guard and the cashier tackled appellant before he reached
 20 the exit, and held him until police arrived. As appellant ran, handfuls of
 21 gold jewelry had fallen from his pockets. While appellant was on the
 ground, he pulled more jewelry out of his pockets and pleaded for release.
 Silver and gold jewelry recovered from appellant's person and the
 22 surrounding areas was valued at over \$20,000 retail.² Two sets of keys

23 ¹A security who saw the struggle also described appellant "flailing his arms"
 24 as he tried to escape.

25 ²Santo testified the jewelry was sold by weight, with gold priced at
 26 approximately \$23 per gram retail and \$8.50 to \$14 wholesale. Silver was priced at
 approximately \$2.50 per gram retail, and \$.80-\$1.25 wholesale. The silver jewelry
 taken from appellant's person weighted approximately 1619 grams, and the gold
 27 approximately 174 grams. The remaining jewelry that had been removed from the

were found in the area where appellant had been tackled. One set fit the jewelry display cases, and had been taken from the watch repair bench. The second set belonged to a car in the parking lot registered to appellant's girlfriend. Eleven bags of methamphetamine, two photos of appellant, and utility bill in his name were found in the car. The girlfriend denied ownership of the methamphetamine. Two single-edge razor blades were found on appellant's person during the ensuing booking search.

(Resp. Ex. 3 at 1-3.)

DISCUSSION

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). "Under the 'reasonable application clause,' a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

display cases included approximately 503 grams of gold rings and 513 grams of silver rings.

1 “[A] federal habeas court may not issue the writ simply because the court
2 concludes in its independent judgment that the relevant state-court decision applied
3 clearly established federal law erroneously or incorrectly. Rather, that application must
4 also be unreasonable.” Id. at 411. A federal habeas court making the “unreasonable
5 application” inquiry should ask whether the state court’s application of clearly established
6 federal law was “objectively unreasonable.” Id. at 409.

7 The only definitive source of clearly established federal law under 28 U.S.C. §
8 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of
9 the state court decision. Williams, 529 U.S. at 412; Clark v. Murphy, 331 F.3d 1062,
10 1069 (9th Cir. 2003). While circuit law may be “persuasive authority” for purposes of
11 determining whether a state court decision is an unreasonable application of Supreme
12 Court precedent, only the Supreme Court’s holdings are binding on the state courts and
13 only those holdings need be “reasonably” applied. Id.

14 Even if the state court decision was either contrary to or an unreasonable
15 application of clearly established federal law, within the meaning of AEDPA, habeas
16 relief is still only warranted if the constitutional error at issue had a ““substantial and
17 injurious effect or influence in determining the jury’s verdict.”” Penry v. Johnson, 532
18 U.S. 782, 796 (2001) (quoting Brecht v. Abrahamson, 507 U.S. 619, 638 (1993)).

19 Lastly, a federal habeas court may grant the writ if concludes that the state
20 court’s adjudication of the claim “resulted in a decision that was based on an
21 unreasonable determination of the facts in light of the evidence presented in the State
22 court proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any
23 determination of a factual issue made by a state court unless the petitioner rebuts the
24 presumption of correctness by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

25 B. Analysis of Claim

26 Petitioner claims his sentence of 35 years to life violates his Eighth Amendment
27

1 right to be free from cruel and unusual punishment. In Lockyer v. Andrade, 538 U.S. 63
2 (2003), the Supreme Court rejected the contention that Supreme Court case law in this
3 area was of sufficient clarity to constitute “clearly established” federal law within the
4 meaning of 28 U.S.C. § 2254(d), with the exception of “one governing legal principle,”
5 specifically: “A gross disproportionality principle is applicable to sentences for terms of
6 years.” See id. at 72. The Supreme Court further noted that the precise contours of that
7 principle are “unclear” and “applicable only in the ‘exceedingly rare’ and ‘extreme’
8 case.” See id. at 73 (citation omitted).

9 In Andrade, the petitioner was accused of stealing a total of \$153 worth of
10 videotapes from two different stores. See id. at 66. The jury found the petitioner guilty
11 of two counts of petty theft with a prior conviction and further found the petitioner had
12 suffered three prior felony convictions that qualified under California’s “three strikes”
13 law, specifically, three counts of first degree residential burglary. See id. at 68. The
14 Supreme Court, observing that “[t]he gross disproportionality principle reserves a
15 constitutional violation for only the extraordinary case,” held the California Court of
16 Appeal’s affirmance of the petitioner’s sentence of two consecutive terms of 25 years to
17 life was not an unreasonable application of clearly established federal law. See id. at 77.

18 In Ewing v. California, 538 U.S. 11 (2003), the petitioner was accused of stealing
19 three golf clubs, priced at \$399 each; he was convicted of one count of felony grand theft,
20 and allegations that he had been convicted previously of four felonies qualifying under
21 California’s three strikes law, specifically, one robbery and three burglaries, were found
22 true. See id. at 18-19. The Supreme Court affirmed the California Court of Appeal’s
23 holding that a sentence of 25 years to life under such circumstances was not grossly
24 disproportionate and thus did not constitute cruel and unusual punishment under the
25 Eighth Amendment. 538 U.S. 11, 30-31 (2003). Looking beyond the petitioner’s most
26 recent offense, Justice O’Connor’s plurality opinion observed:

1 When the California Legislature enacted the three strikes law, it made a
 2 judgment that protecting the public safety requires incapacitating criminals who
 3 have already been convicted of at least one serious or violent crime. Nothing in
 4 the Eighth Amendment prohibits California from making that choice. To the
 5 contrary, our cases establish that “States have a valid interest in deterring and
 6 segregating habitual criminals.” [citations omitted]

7 Id. at 25.

8 In light of the reasoning set forth in Ewing and Andrade, petitioner’s sentence of
 9 35 years to life is not grossly disproportionate to the crimes for which he stands
 10 convicted. The sentences in both Ewing and Andrade were life sentences like
 11 petitioner’s, although petitioner’s sentence is less harsh than Andrade’s and harsher than
 12 Ewing’s insofar as petitioner will become eligible for parole in 35 years, whereas
 13 Andrade became eligible for parole in 50 years and Ewing in 25. In any event, the
 14 circumstances of petitioner’s crime was substantially more serious than the offenses
 15 committed Ewing and Andrade. When petitioner was caught in the process of stealing, he
 16 had already taken approximately \$20,000 worth of jewelry, many times more than the
 17 value of the items stolen by Ewing and Andrade. In addition, in attempting to flee,
 18 petitioner struggled with the store employee and knocked him to the ground, and
 19 petitioner was carrying two single-edge razor blades at the time. As such, petitioner
 20 presented a much more serious risk of harm to others than did Ewing or Andrade.

21 Moreover, as noted, a court may properly consider a petitioner’s criminal history
 22 in determining the proportionality of a sentence under the Eighth Amendment. See, e.g.,
 23 Ewing, 538 U.S. at 29 (“[W]e must place on the scales not only [the petitioner’s] current
 24 felony, but also his long history of felony recidivism.”). Petitioner’s criminal history is
 25 significantly more serious than that of the petitioners in Ewing and Andrade.³ In 1989,

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 27 ³In support of this account of petitioner’s criminal history, respondent cites to
 28 pages 543 to 559 of the Clerk’s Transcript. Respondent did not include these pages
 29 in the portion of the Clerk’s Transcript filed in support of the answer, however.
 30 Nevertheless, as this description of petitioner’s criminal history was set forth by the
 31 California Court of Appeal, and is not disputed by petitioner, the Court accepts it as
 32 accurate. See 28 U.S.C. §2254(e)(1) (on habeas review, federal court presumes

1 petitioner was convicted of statutory rape after having sexual intercourse with a twelve-
2 year-old girl, and of driving under the influence of drugs or alcohol. In 1992, petitioner
3 was convicted of first degree burglary, and while on probation for that offense, he was
4 convicted of another burglary, for which he was sentenced to a term of six years in state
5 prison. In 1996, he was convicted of possession of a controlled substance and was
6 sentenced to a state prison term of two years. In addition, petitioner had his probation
7 revoked on 15 occasions, and he was on parole at the time of the instant offense. This
8 criminal history indicates that petitioner has a propensity to reoffend, poses a danger to
9 others, and is not deterred from committing crime by shorter punishments.

10 Furthermore, petitioner's circumstances are readily distinguishable from those
11 presented in Ramirez v. Castro, 365 F.3d 755 (9th Cir. 2004), in which the Ninth Circuit
12 Court of Appeals held a sentence of 26 years to life for one count of petty theft was
13 grossly disproportionate. See id. at 768. There, the petitioner's prior criminal history
14 “[was] comprised solely of two 1991 convictions for second-degree robbery obtained
15 through a guilty plea, for which his total sentence was one year in county jail and three
16 years of probation,” and the prior offenses were “more accurately described as
17 ‘confrontation petty theft.’” Id. As noted, petitioner here had a much more serious and
18 extensive criminal history dating back 12 years. His prior convictions involved sexual
19 misconduct with a minor, driving under the influence and burglary, which all pose a
20 serious threat to the safety of others, and led to two terms in state prison. Unlike the
21 petitioner in Ramirez, petitioner does not present the “extremely rare case that gives rise
22 to an inference of disproportionality.” See id. at 770.

23 Accordingly, the California Court of Appeal's determination that petitioner's
24 sentence was not grossly disproportionate to his crime was not an unreasonable
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26 correct any determination of factual issue by state court unless petitioner rebuts
27 presumption by clear and convincing evidence).

1 application of or contrary to clearly established federal law within the meaning of 28
2 U.S.C. § 2254(d)(1), and petitioner is not entitled to habeas relief.

3 **CONCLUSION**

4 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

5 The Clerk shall close the file.

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7 DATED: November 29, 2007

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JAMES WARE
United States District Judge